89-1720

No.

IN THE

SUPREME COURT OF THE UNITED STATES

TERM October 1989

ALVIN DOUGLAS, Petitioner

vs.

JOHN MARSH, SECRETARY OF THE U.S. ARMY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the District Court placed too onerous a burden on plaintiff for establishing a prima facie case of discrimination.

Whether anecdotal evidence of disparate treatment and impact is sufficient proof for a prima facie case of discrimination and pretext in an individual, non class action, in the absence of a sizeable work force.

Whether discriminatory conduct in 1971, upon which all subsequent personnel actions are based, and which remains uncorrected, constitutes a continuing violation of Title VII.

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1989 TERM

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OF THE UNITED STATES ARMY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Alvin Douglas, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court for the Northern District of California, affirmed on appeal to the Court of Appeals for the Ninth Circuit and entered in the above-entitled case on February 9, 1990. The judgment of the United States District Court is printed in Appendix A hereto. The decision of the Court of Appeal is printed in Appendix B hereto.

LIST OF PARTIES

Petitioner is Alvin Douglas, represented by Jack P. Dougherty, attorney of record.

Respondent is John Marsh, Secretary of the United States Department of the Army, Corps of Engineers, South Pacific Division, Laboratory facility at Sausalito, California, represented by Stephen Shefler, United States Attorney, attorney of record.

JURISDICTION

The basis for jurisdiction in the United States District Court is Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 2000e et seq.

The judgment of the United States District Court was entered on February 2, 1988. The judgment was affirmed by the United States Court of Appeals for the Ninth Circuit and entered on February 9, 1990.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Section 2101 (c), 28 U.S.C. Section 2154 (1) and United States Supreme Court Rules, Rule 17.

STATUTES INVOLVED

42 U.S.C. Section 2000e et seq.

Title VII of the Civil Rights Act of 1964

STATEMENT OF THE CASE

This is a case of discrimination. Petitioner is a black male. Petitioner began civilian employment with the federal government, U.S. Department of the Army, in April 1964. For the next 23 years, petitioner applied himself in devoted service to his employer, with conduct intended to improve his position and wages. Petitioner contends that he was a victim of disparate treatment in violation of Title VII and the Civil Rights Act of 1964, and, that policies and practices of the Department of the Army disparately impacted black employees at his place of employment. Petitioner brought this action on his own behalf, not as a class action.

A. The Evidence

Petitioner began employment in April 1964 as a Laboratory Aide in the Wage Grade schedule of federal employment. The "Wage Grade" is considered non-technical, laborer type employment. In addition to Wage Grade ("WG") employees, federal employment at the Lab included "General Schedule" ("GS") employees. The General Schedule is considered technical and skilled employment. The grade level in each system is divided into "steps" which permit in-grade increases according to time in grade. At the time of petitioner's initial employment, black personnel held only laborer and lower technical positions. [RT 1-10:24 - 1-11:2] This remained true through the time of trial in the district court in January 1988.

The Lab is a facility which receives materials from various government contract jobs for testing. The materials are received and tested, or produced and tested, for evaluation of quality and use in the field. The work is technical in nature requiring professional skills for interpretation, technical skills in operating equipment and laborer skills for moving materials.

In 1968, petitioner was qualified for a grade change from the WG schedule to the GS due to his "additional education and experience". In a Grade change Request dated "6 Dec 68" it was stated by the Director of the Lab that petitioner had been assigned, performed, and shown ability to perform satisfactorily, the more difficult duties of a higher category. [Petitioner's Exhibit C-11] Despite the ability of petitioner and the actual performance of these duties, petitioner was not changed to the GS in 1968.

In late 1970 or early 1971, petitioner was approached by Mr. John Ott, Director of the Lab, and asked whether petitioner was interested in transferring from the WG to a GS-4 position, which change would result in a loss in pay of approximately 31 cents per hour. Petitioner clearly stated that he could not afford to move backwards in pay and declined the move. [RT 1-14:5 - 1-15:20]

In July 1971, petitioner was again approached by Mr. Ott and advised that he could move to the GS at that time and gain a 1 cent per hour increase. Petitioner accepted this "promotion".

The July 1971 promotion to the GS-5, step 9, position is key to petitioner's claim. The circumstance of the move has affected petitioner's position and is the root cause of his inability to advance in salary and grade since that time. The move constitutes the basis for his claim of a continuing violation of his Title VII rights.

The evidence presented at trial establish the following prima facie evidence of discrimination. Petitioner was qualified for the GS-5 position in 1968. [Exhibit C-11] Petitioner was not moved to the GS-5, step 9, position until July 1971. That move was designated a "promotion". [Exhibit C-16] However, as a WG employee, petitioner was due for a 5.5% increase in salary in November 1971. [RT 1-25:15 - 1-26:14] The increase due was known to the Lab Director, but not to petitioner, prior to the "promotion".

Petitioner's July 1971 "promotion" resulted in a 1 cent per hour increase, or .003%, for the entire 1971 year. When the WG received the 5.5% increase four months later in November 1971, petitioner began receiving less money for his work than his previous job was paid.

Petitioner was not told at the time of the "promotion" that an increase was due in November 1971 to WG employees. Petitioner was not told when the GS increase would take effect each year. [RT 1-42:9-13] If told of the November increase, petitioner would not have accepted the GS position in July 1971. [RT 1-

70:20 - 1-71:3]

Evidence obtained during discovery, and presented at trial, shows that the Director of the Lab, John Ott, was aware at the time of petitioner's "promotion" of the increase due to WG employees in November 1971. [RT 1-116:2-15] The Director was aware of each employee's hourly wage. [RT 1-115:2-5] The Director prepared the annual budget for the Lab and included increases in salary during the course of the coming fiscal year. [RT 1-115:13-17, 1-116:2-15] Indeed, the Director knew of the anticipated WG pay increases, and the amount of the increases, in the beginning of July of each year. [RT 1-120:10 - 1-121:14] This testimony is not disputed.

Mr. Ott, the Director at the time of the "promotion", testified that a vacancy existed into which petitioner was placed [RT 1-122:13 - 17], although his testimony was contradicted by the testimony of Dorothy Coupe, Personnel Officer for respondent. [RT 2-196:24 - 2-197:4] Ms. Coupe testified that the move was due to a gradual growth of job duties.

Mr. Ott testified that vacancies were filled by review and promotion from within the organization. This testimony was corroborated by the testimony of Cleon McNicol, a subsequent director at the Lab. [RT 1-143:16 - 24]

Mr. Ott testified that petitioner was qualified for GS-5 in 1968, [1-125:12-14] but was not moved in 1968 because "it takes a little time to process the paper work and get all the

necessary changes". [RT 1-126:13-23] Mr. Ott does not recall why petitioner was moved before the November 1971 increase rather than after. [RT 1-125:15-19]

At the time of petitioner's "promotion", Mr. James Moore, a black male, held a GS position at the lab. [Exhibit S-12] Exhibit S-12 reflects the death of James Moore in November 1971, which left his GS-6 position vacant. However, petitioner was not moved into that vacancy at that time, but remained in the GS-5 position.

An increase in salary was given all WG employees in November 1971. As a result of the July 1971 "promotion" to GS, petitioner received no increase whatsoever in 1971. Petitioner did not receive the November 1971 increase and the move to GS did not include, nor consider, the November 1971 increase due. Every federal employee in the country, whether GS or WG, received an increase in pay in 1971. Petitioner did not.

Prior to the "promotion", petitioner was earning an hourly salary of $4.21 per hour [Exhibit C-2], which translates to an annual salary of $8756.80. Petitioner was due to receive the 5.5% increase, granted to all WG employees, in November 1971. According to the testimony of Mr. Ott, salary increases due for each year were known in June for purposes of calculating the new fiscal year budget. 5.5% added to the $8756 annual salary would have brought petitioner to a $9237.64 annual salary.

Petitioner did not receive the 5.5% increase before the

alleged "promotion". Rather, a lower rate of pay was obtained in July 1971 when his position was "converted" to GS-5 at the rate of $8786 per year from the WG rate of $8256, i.e., $30.00 annually or about 1 penny per hour.

After the "promotion", and for the rest of his career with the federal government, each grade and step change, each personnel action and each paycheck received by petitioner was detrimentally impacted. The continuing failure to correct the wrong contributes to a "continuing violation" of Title VII.

In 1972 a GS-7 position became vacant for which petitioner was qualified, and petitioner was so advised by his immediate supervisor. [RT 1-32:24 - 1-34:1] After discussion, petitioner's superiors decided to rewrite the position to a lower grade (GS-6) before advancing petitioner to the vacant position. [RT 1-34:2 - 1-37:4]

In 1979 the Lab was "reorganized". Petitioner was given additional duties and responsibilities without a corresponding grade increase. Petitioner had been routed to training schools by his employer for the stated purpose of advancing his job. [RT 1-51:2-4] Although the added training increased petitioner's abilities on the job, no advance was forthcoming.

In 1981, petitioner was observed by the lab Director opening the Lab on a regular work morning. Petitioner had a security clearance and was authorized to have possession of keys to the building. The next day petitioner was directed to turn in

his keys by the Lab Director. An Equal Employment Opportunity commission hearing instituted by petitioner resulted in a recommendation that the keys be returned. The keys were never returned.

At one point, petitioner requested job descriptions from the Northern Pacific Division of the Lab, in Oregon, to compare with the Southern Pacific Division. Upon receipt and comparison, petitioner discovered that his position required more duties and responsibilities than positions graded GS-7 and GS-9 in the Northern Division. [RT 158:19-14] Petitioner was being paid on the GS national level, but not being paid at that level for the work being done.

In addition to the specific anecdotal events of discrimination, petitioner contends that a pattern and practice of discrimination against black personnel existed at the Lab.

It is uncontradicted in the evidence that no black personnel have ever held a position above GS-7. It is uncontradicted that no black personnel have ever held an administrative, professional, or supervisory position. It is uncontradicted that no black personnel have ever held a position in the Personnel Department which evaluates Lab positions for grade increases. It is uncontradicted that black personnel have held only laborer and lower technical positions.

In addition to the reduction and rewriting of position from

Grade 6 to 5 in 1971 and from Grade 7 to 6 in 1972 for petitioner, Mr. Horace Blake, a black male testified that a promotion given him in 1973 to a WG grade was re-written and reduced from a WG-5 to a WG-4. No reason for the grade reduction was given. [RT 1-164:18 - RT 1-166:20] This testimony was not challenged by cross examination.

Mr. Blake testified that he was told by his supervisors that to advance as a black person it would be necessary to "get out. There wasn't any advance while you were there." [RT 1-172:9-25] Mr. Blake also testified that white employees would receive promotions without prior knowledge, which practice never occurred to black employees. [RT 1-173:9-19] None of this testimony was challenged by cross examination.

Mr. Blake testified to further differences in treatment between white employees and black employees. One white employee in a similar position as petitioner had supervisory authority, while petitioner did not. [RT 1-163:3 - 1-169:9] Also, Mr. Blake testified, in contrast to the reduction in grade for black employee promotions, that white employee Craig Jansen was promoted to a GS-7 position that had been occupied as a GS-6 position, but vacated, by a black employee. [RT 1-169:10 - 1-170:25]

B. The Rulings Below

The District Court ruled that petitioner did not sustain his burden of proof and did not establish racial discrimination or disparate treatment. The District Court ruled that petitioner failed to show that respondent's explanation and evidence were mere pretext. Petitioner contends that the district court based it's conclusions on findings of fact which are clearly erroneous and made no findings on significant evidence of discrimination.

The Court of Appeals affirmed the decision of the District Court, finding that petitioner did not establish a prima facie case of disparate **impact**. The Court of Appeals viewed the 1971 change from WG to GS as a "transfer" rather than a "promotion" and found that the "transfer occurred before the amendment of Title VII and so is not actionable except as part of a continuing discriminatory pattern and practice of promotion"

The Court of Appeals ruled that disparate impact was not shown by statistical evidence that black employees were promoted differently, or, that blacks had applied for positions from which petitioner was precluded. The Court of Appeals did not address the issue of disparate **treatment.**

REASONS FOR GRANTING THE WRIT

The District Court's findings were inadequate and clearly erroneous. On review by the Court of Appeals, the court did not address the disparate treatment claim and ruled that the lack of statistics precluded petitioner's claim. Consideration of the

disparate treatment claim and findings on significant facts in evidence, are necessary to determine the merits.

Failure to address the issue of disparate treatment, and the absence of findings of additional facts, render the rulings and the judgment below inconsistent with other federal court opinions with regard to the basis for a finding of, and the burden of proof in, a prima facie case of discrimination. Absent findings on "business necessity" and "pretext", the discrimination claim cannot be properly addressed.

The purpose and meaning of Title VII was stated in Griggs v Duke Power Co. 401 U.S. 424, 429-430, 91 SCt 849, 852-853, 28 LEd2d 158 (1971):

"[Title VII was enacted] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Petitioner's position was 'frozen' by the improper move to GS in July 1971, and the opportunity to advance has been non-existent. The practice of promotion from within, with reduction in grade of vacancies for black persons, without rhyme or reason, has operated as a barrier to advancement for petitioner and for other black employees at the Lab.

PRIMA FACIE DISCRIMINATION

The District Court ruled that "there is no evidence that any actions on the part of plaintiff's supervisors were racially motivated, but rather were performed with the best interests of the plaintiff in mind." The Court of Appeals did not address the claim of disparate treatment.

The McDonnell-Douglas v Green 411 U.S. 792, 93 SCt. 1817, 36 LEd2d 668 test for proof of prima facie discrimination is not inflexible and is applied to individual cases as appropriate. Analogously to the present case, the court in Petit v United States 488 F2d 1026 (1973) states:

> "We, therefore, hold that a prima facie case of failure to promote because of racial discrimination is made by showing: (i) that plaintiff belongs to a racial minority (ii) that he was qualified for promotion and might reasonably have expected selection for promotion under the defendant's on-going competitive promotion system (iii) that he was not promoted, and (iv) the supervisory level employees having responsibility to exercise judgment under the promotion system betrayed in other matters a predisposition towards discrimination against members of the involved minority."

The burden to show a prima facie case of disparate treatment is not an onerous one. Texas Dept. of Comm. Affairs v Burdine 450 U.S. 248, 253, 101 SCt 1089, 67 LEd2d 207 (1981).

The four part McDonnel Douglas test "was not intended to be an inflexible rule...the facts necessarily will vary in Title VII cases, and the specification...of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations," Furnco Constr. Corp. v Waters 438

U.S. 567, 575, 98 SCt. 2943, 2949, 57 LEd2d 957 (1978).

The plaintiff need only show actions by the employer "from which one can infer, if such actions remained unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" Furnco, supra, at 576, 98 SCt. at 2949 (quoting Teamsters v United States, 431 U.S. 324, 358, 97 SCt. 1843, 52 LEd2d 396 (1977)).

Petitioner contends that the evidence in the present case is sufficient to constitute a prima facie case.

(i) Petitioner is a black male.

(ii) Petitioner was qualified for a GS-5 position in 1968 according to respondent's documents [Exhibit C-11], and according to the testimony of John Ott. Petitioner reasonably expected that his transfer in 1971 was a "promotion" because he was told by the "Personnel Action" form [Exhibit C-16], and by his supervisor, that it was a promotion.

According to the anecdotal history provided by the Lab Director and according to the personnel classification and qualification standards, petitioner could reasonably expect that he had been selected for "promotion" to the GS-5 position in July 1971. At the time of this "promotion", the Director had knowledge of the November 1971 increase due to WG employees. However, the "promotion"/"conversion" was made prior to the 5.5% WG increase to which petitioner was entitled.

Petitioner was qualified for a vacant GS-7 grade position in 1972. But the position grade was reduced by respondent and petitioner was promoted only to GS-6. The GS-6 position was vacated in 1971.

As the years passed, petitioner could reasonably expect to be selected for further promotion consistent with the treatment of his immediate supervisor, a white employee, George Billings. [Exhibit S-1] Petitioner was not promoted in the same manner.

(iii) Petitioner was not promoted as expected. Petitioner was transferred from WG to GS in 1971, and according to the testimony from respondent's witnesses at trial, was not "promoted", but was "converted". The testimony regarding "conversion" is directly contradicted by respondent's own "Personnel Action" form prepared at the time of the promotion. [Exhibit C-16] At the time of the so-called "conversion" petitioner was led to believe he was promoted, was told he was promoted, but at trial, respondent's position was that the intent was to convert, not promote.

In 1972, a GS-7 position became vacant, but the position was rewritten and reduced to a GS-6 for petitioner. According to personnel classification and qualification standards [Exhibit Q-2, Q-4], petitioner had sufficient generalized and specialized experience for the GS-7 position. Petitioner was placed only to the GS-6 position, a position to which he would have properly been placed the year before.

(iv) No black persons held positions in administration, supervision, professional nor personnel classification positions during petitioner's entire 23 years of federal employment. Black personnel were promoted only into reduced grades. Black personnel have been denied re-entry into the workforce. Vacancies were not posted. Black personnel held only laborer and lower technical positions. A predisposition by personnel to maintain a system with a non-black hierarchy persisted.

A. Disparate Treatment/Business Necessity

In a disparate treatment case, evidence of intent to discriminate is typically necessary. Because there is rarely direct evidence of intent, such proof is obtained inferentially from the circumstances. In this case, respondent gave various reasons for the 1971 "conversion", for the 1972 promotion to the reduced GS-6 grade, and subsequent acts. The reasons given are inconsistent with, and directly contradicted by the evidence. Thus, the fuel of inference warms the presumption of discrimination as the only basis for the treatment of petitioner in this case.

When prima facie evidence of discrimination is produced, the defendant must show legitimate business necessity. After some legitimate business necessity is shown, plaintiff may show the asserted necessity is pretextual or unworthy of credence. Texas Dept. of Community Affairs v Burdine 450 U.S. 258, 255-256,101 SCt. 1089, 67 LEd2d 207 (1981).

John Ott, Director of the Lab in 1968 testified that the

1968 qualification and grade assignment request [Exhibit C-11] was not accomplished at that time because there was a "delay" in processing. Yet, the evidence from respondent indicates that it would never take as long as two years to process paperwork. [RT 2-252:5-22] No evidence was offered to explain the failure to promote or convert in 1968. No evidence has been offered to rebut the inference suggested by petitioner that race was a factor in the failure to promote in 1968. Clearly, no legitimate business necessity has been offered to explain the 1968 failure to promote.

John Ott testified that the reason for petitioner's transfer to GS in 1971 was because petitioner "was in a temporary status and vulnerable to release in a reduction-in-force situation." [RT 1-110:6-7] Yet, petitioner's Service Record Card [Exhibit C-1 and C-2] indicates that petitioner was in temporary status only from April 1964 until June 1967 when he was converted to Career Conditional. Petitioner then obtained Career Tenure in February 1968. [See also RT 2-213:7-16, testimony of respondent Personnel Officer] Clearly, vulnerability to reduction in force was not a legitimate business necessity, and in fact is a pretext, for transferring petitioner to the GS before November 1971 since petitioner was not in temporary status at that time.

Respondent has presented evidence to explain another reason for the "conversion" through a Personnel Classifier, Lillian Dimla. Ms. Dimla testified that, according to Revised Grading Standards issued in December 1971, petitioner's conversion to GS

would have been made at some future date in any event. [RT 2-224:11-15]

Petitioner asserts that no legitimate reason exists to move petitioner before the revised grading standards were issued. This is especially true when known that petitioner would fall behind in salary 4 months after the "promotion". A conversion action made in December 1971, rather than July 1971, would have been proper because accomplished after the November 1971 WG increase. A proper "conversion", in December, could be made without the detrimental affect to petitioner's wages. Clearly, the revised standards issued in December 1971 were not a reason for "converting" petitioner to GS in July 1971, before they were issued.

The position of respondent regarding the change due to revised grading standards also has a compelling pretextual nature. Ms. Dimla testified that when someone moves from WG to GS and there is no step to put them into, "then they get — retain pay or safe pay for two years." [RT 2-227:15-25] If a change is made which is involuntary, employees have pay retention rights. But if there is a step which will give them more money, then they go to that step. [RT 2-253:13-24] Safe pay, or retain pay, is provided for in 5 USC Section 5362 (See Appendix C). Petitioner did not get retain pay or safe pay.

Petitioner would not have accepted a conversion to GS had he known that he would lose money. On that basis, the

move was involuntary. Regulations provide for protection of pay for employees. The protection normally applicable to employees was not applied to petitioner. No explanation is given by respondent for failing to provide "retain pay" or "safe pay" for petitioner. Since all legitimate reasons have been exhausted, petitioner contends the only remaining reason for such treatment is due to his race. The continuing failure to correct petitioner's pay according to regulations contributes to the "continuing violation" of Title VII.

As stated in Satz v ITT Financial Corp, 619 F2d 738 (1980 8th Cir.)

"...The practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues. See Corning Glass Works v Brennan 417 U.S. 188, 205-10, 94 SCt 2223, 2233-2235, 41 LEd2d 1 (1974) (Equal Pay Act) Cf. Farris v Board of Education 576 F2d 765, 768 (1978 8th Cir)" Satz v ITT Financial Corp 619 F2d 738 (1980 8th Cir).

The policies and procedures cited by respondent support a "conversion" of petitioner in December 1971 only if determined that a promotion was actually not intended. No reason, consistent with respondent's personnel policies, exists to make a change in Wage System for petitioner in July prior to the November 1971 increase in the face of the knowledge of the Director that the November 1971 increase was due. No evidence was offered at trial to show similar treatment of other "converted" employees. The inference is that the change was made, without including the known increase, only in the case of petitioner. Having excluded

all reported reasons, the only explainable reason for making the change for petitioner at that particular time is that asserted by petitioner, because of his race.

Respondent's contention is that the "promotion" was not intended to be a promotion, but rather a "conversion" from one system to the other using a "straight across" conversion. Contrary to the testimony of Mr. Ott, respondent contends the 1971 change was warranted by "accretion of duties", rather than "promotion". Respondent contends that a position classifier reviewed petitioner's "position" and evaluated the duties with the grade. However, petitioner was reviewed before the WG to GS change, but not reviewed when the correct position opened after the death of Mr. Moore.

Qualification and Classification Standards, as policy of respondent for grading positions, is in evidence as Exhibit Q-2 through Q-5. The evidence is consistent with petitioner's claim. Petitioner has extensive specialized and extensive general experience which qualify him for advancement. Section S8-3 of Exhibit Q-2, "Federal Wage System". defines "Promotion" as follows:

"(d) Upon promotion, an employee is entitled to be paid at the lowest scheduled rate of the grade to which promoted which exceeds his or her existing scheduled rate of pay by at least four percent of the representative rate of the grade from which promoted."...

"(g)(4) Simultaneous pay changes. When a job or appointment change and entitlement to a higher rate of pay occur at the same time, the higher rate of pay is considered an employee's

existing scheduled rate of pay. If the employee is entitled to two pay benefits at the same time, the agency shall process the changes in the order which give him/her the maximum benefit."

Petitioner contends that the stated "promotion" must result in a minimum 4% increase according to regulation. As a result of the Director's knowledge of the pay increase due in November, petitioner contends that he is entitled to a "simultaneous pay change", i.e., promotion to GS after the 5.5% due, and an additional 4% minimum for the promotion. Upon that basis, the grade change can be made. Nothing less has been done for white employees.

Exhibit Q-4 contains Position Classification Standards obtained by discovery from respondent. In discussion of the Development of the Technician Concept, the Standards state:

"...The identification of technician occupations has provided clearly distinguishable avenues of career development for both the professional and the technician. It has provided a basis for relieving the fully-trained professional of those parts of his job which do not demand the full utilization of his training, thus freeing him for greater professional contribution to his organization. The development of crossover opportunities from the technician to the professional occupation...has served to encourage the development of technicians toward full professional status and recognition."

In Subchapter 3. Position Classification Standards, one of the purposes is stated as:

"They establish a logical structure of occupational relationships in terms of kind and level of work, and qualifications required. This permits identification of career ladders, suitable recruiting sources, and placement opportunities. ... These management decisions could, for example, involve structuring duties of positions so as to conserve professional skills which are in short supply by making maximum use of technicians, or could

involve organizing work in such a way as to provide cross occupational training and promotional opportunities."

The procedures are geared to promote advancement and opportunity. Yet, advancement and opportunity were closed to petitioner. Nonetheless, because respondent presented some argument for "business necessity", it is necessary for petitioner to present evidence of pretext.

B. Pretext

Aside from pretext as argued above, the conditions of the workplace show pretext in the evidence of disparate impact. Petitioner brings this action on his own. This is not a class action. However, petitioner has presented anecdotal evidence of a pattern of discrimination which has impacted black personnel. Statistical evidence is of little help in an organization that retained no statistical evidence of the workforce [Exhibit M-10, Interrogatory No. 5]. Statistical evidence is not helpful in an employment environment which does not have a large workforce and has specialized employment functions. However, evidence of the history of the workplace reveals that no black has held the position of GS 7 or above during the entire course of petitioner's 23 year employment. No black has held an administrative, supervisory, personnel or professional position during the entire course of petitioner's 23 years of service. The Black personnel have held only laborer and lower technical positions.

Petitioner's immediate supervisor during the time of the change and thereafter was George Billings. Mr. Billings, a white male, began employment at the Lab before petitioner, but in the same job position of Laboratory Aide. Mr. Billings progressed from his first GS position at grade 6 and advanced to grades 7, 9 and 11 over a period of 24 years. [Exhibit S-1] As Mr. Billings progressed, petitioner could, and did, reasonably expect to progress at a similar rate from the same position.

By the time he had seen his white superior advance from GS-7 to 9 to 11, petitioner clearly began to notice that his promotions were not as dependable as his white superior. Petitioner felt groomed to follow Billings' footsteps but was not advanced upon Billings' promotions nor on Billings' departure.

Respondent asserts, through the testimony of Lillian Dimla, that the GS grade series "802", within which petitioner's position fell, was a "one-grade-interval-series", i.e., only one grade increase was permitted at any one time. Therefore, petitioner could not advance from the Grade 5 to 7, nor from the 6 to 8, nor from the 7 to 9. The pretext in this position is that her testimony is directly contradicted by the Service Record Card of George Billings. [Exhibit S-2] Mr. Billings was promoted from "802" series grade 7 to 9 in 1957 and from "802" series grade 9 to 11 in 1967.

In Watkins v Scott Paper Co. 530 F2d 1159, 1172, (5th Cir. 1976) n.17, it was stated:

"F.R.Civ.P. 52(a) provides that 'due regard shall be given the opportunity to the trial court to judge the credibility of witnesses'. Where findings do not rely upon the credibility of witnesses, the force of the clearly erroneous doctrine is mitigated. See e.g., United States v Stringfellow 414 F2d 696, 699 (1969 5th Cir); A.J. Indus Inc., v Dayton Steel Foundry Co 394 F2d 357, 361-62 (1968 6th Cir); United States v United Steelworkers of America 271 F2d 676, 685, aff'd, 361 U.S. 39, 80 SCt 1,4, 4 LEd2d 12 (1959 3rd Cir); Lamb v ICC 259 F2d 358, 360 (1958 10th Cir).

Reliance on the credibility of witnesses in this case is not so necessary as is a finding on the proper interpretation of the policies of respondent. While a witness testifies honestly, believably and with conviction, the actual findings of fact in this case require only that agreed, undisputed, uncontradicted and documented findings of fact be considered to show discrimination, absence of legitimate business necessity and pretext.

Where evidence is uncontradicted, where documents which were prepared at the time directly contradict, and clarify, testimony given at trial, the clearly erroneous standard is mitigated. Here, for example, the assertion that grade changes occur at no more than 1 grade at a time in the 802 series is simply not true. There were available methods for advancing two grades for the caucasian Mr. Billings, but no such opportunities for petitioner, with the same beginnings.

The Court of Appeals stated that petitioner did not show by statistics that there was underrepresentation in the workforce.

However, evidence admitted at trial show under-representation. Correspondence to "All employees - South Pacific Division" by Donald Palladino, Brigadier General and Commanding Officer of the U.S. Army Corps of Engineers, South Pacific Division, dated July 2., 1983 clearly states the affirmative posture of the Corps in implementing "Policy" for equal employment opportunity. [Exhibit Q5:3] The General reports that:

"...we are mandated by law and policy to correct under-representation in our workforce. I am firmly committed to these laws and policies because they are right and just.

"We have made progress in our Equal Employment Opportunity Program but must do better in the future. We still have a number of occupations within our workforce in which minorities, women and the physically handicapped are under-represented.

"Equal employment opportunity cannot be a neutral policy. It requires goal setting programs that include measurement and evaluation factors ... All employees have a responsibility for active support of this program.

"I fully expect that we will achieve substantial progress each year and know I can count on each and every employee to assist in this important endeavor."

Clearly the policy stated by General Palladino in Exhibit Q 5 is the policy of the Corps of Engineers, petitioner's employer. The employer acknowledges underrepresentation of minorities in the workforce and the need to correct the under-representation. It is clear that the Corps of Engineers was aware, by the year 1983, 12 years after the discriminatory "promotion", of under-representation. As a result, the Corps of Engineers in the Southern Pacific Division directed affirmative improvement to correct the situation.

Petitioner had earned and deserved a review for upgrade according to the model of his white predecessor and according to the affirmative policies of respondent. Petitioner had been placed in the GS for the alleged purpose of advancement. Petitioner did not receive the same advancement given his predecessor, even after the establishment of affirmative policies, although petitioner attended every course and seminar available for the purpose of advancing his position and career.

In Morita v So. Cal. Permanente Group 541 F2d 217, 219-220 (1976) the court stated:

"... disparities in the number of minority and other employees may establish the plaintiff's prima facie case. United States v Ironworkers Local 86 443 F2d 544, 551 (9th Cir.) cert denied., 404 U.S. 984, 92 SCt 447, 30 LEd2d 367 (1971)."

In United States v Ironworkers Local 86, supra, statistical evidence was not helpful because the statistical universe was small. Similarly, in this case the statistical universe is small. However, in this case the pattern is inferred and apparent from a spectrum cut from the experience of petitioner's 23 years of employment.

In addition, there is statistical evidence in this case within the evidence submitted at trial. Plaintiff's Exhibit Q 5 consists of documents provided from the respondent which represent, to the extent available, the statistical involvement of minorities in employment. At the time of discovery, the Army produced the Equal Employment Opportunity Workforce Profile for Fiscal years 1982-83 and 1983-84. Earlier statistics were unavailable.

Page 1 of Exhibit Q 5 shows that black employees held 100% of the "Wage" or laborer type positions, 33%, or 2 positions, of the technical positions, and 1, or 3%, of the clerical positions.

Notably, the categories of "Administration" and "Professional" contain no entries in the column designated "Black Male". Plaintiff, and all witnesses, have testified that there has never been a black male in an administrative, professional, supervisory position, nor, above the GS-7 grade. Such evidence is uncontradicted.

The grounds asserted by respondent for the treatment of petitioner throughout his career are clearly pretextual. There exists no reason for the failure to advance petitioner to his proper grade.

CONCLUSION

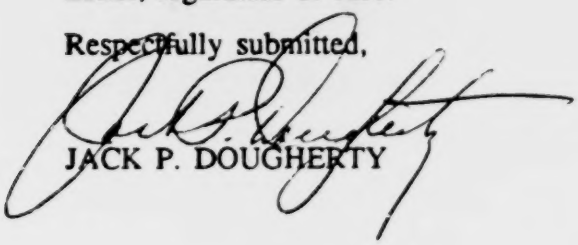
Title VII proscribes "not only overt discrimination but also practices that are fair in form but discriminatory in operation" Griggs v Duke Power Co. 401 U.S. 424, 431, 91 SCt. 849, 28 LEd2d 158. The regulations under which respondent is required to function in its employment practices appear fair in form. However, as applied to petitioner, his career of service is unrecognized and unrewarded in comparison to all employees to whom a comparison can be made.

Petitioner's perspective of his career, and what he can review of his service to government, is not equal to the review by white employees. Black personnel must have the opportunity

to be proud of their career achievements equal to the opportunity of white personnel. Artificial barriers to such opportunity must be taken down to permit equal participation in all walks of life.

Petitioner requests this Court to even the scales of justice and provide opportunity to all persons, and specifically to petitioner, regardless of race.

Respectfully submitted,



JACK P. DOUGHERTY

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED FEBRUARY 2, 1988

NO. C-83-2200 SC

ALVIN DOUGLAS,

PLAINTIFF

VS

JOHN MARSH, SECRETARY OF THE UNITED STATES ARMY

DEFENDANT.

This matter came on regularly for trial by the court, without a jury, on the 19th day of January, 1988. Plaintiff was represented by Jack P. Dougherty, Esq., and the defendant was represented by Stephen Shefler, Assistant United States Attorney.

The court, having heard and considered the evidence and argument presented by counsel, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Plaintiff, Alvin Douglas, a black male, brought this action pursuant to 42 U.S.C. Section 2000e-16, seeking declaratory and injunctive relief and compensatory damages for alleged racial

discrimination in his employment with the United States Department of the Army Corps of Engineers by its Secretary, John Marsh. This court has jurisdiction in the matter.

Plaintiff was employed by the Corps of Engineers at its laboratory facility located in Sausalito, California. Plaintiff has continually, to this date, served with said Department of the Army, as a civilian employee. Employment with the government, as a civilian, is accomplished in either the "Wage Grade" (W.G.) or "General Schedule" (G.S.) classification.

Wage Grade employees are paid according to the prevailing rates of the employment locale. General Schedule employees are based on national wages, set by Congress. General wages differ from locality to locality, but General Schedule wages are uniform throughout the United States.

General Schedule positions are considered technical, analytical, and skilled positions. Wage Grade positions are generally non-technical, laborer positions. Plaintiff commenced his employment in 1964 as a laborer, which employment was classified as a Wage Grade position.

The issues in this case are whether or not the plaintiff was a subject of various acts of racial discrimination in his employment. The plaintiff alleges the following acts of discrimination from which he desires relief:

(1) In 1971 (July 4), when his classification was changed form W.G.5 to G.S.5, this action was racially motivated, to his

detriment.

(2) In 1972, when he was promoted from G.S 5 to G.S 6, this action also was racially motivated to his detriment, as he should have been promoted to a G.S 7.

(3) In the 1979 reorganization of the department in which plaintiff was working, he was given additional responsibilities which did not result in his receiving a grade increase.

(4) In 1981, his laboratory keys were taken from him, which taking and retention was racially motivated.

(5) The "pattern and practices" of the laboratory more severely impacted on black employees than on white employees.

In late 1970, plaintiff was approached by the Director of the Division laboratory, where plaintiff worked, regarding a change from Wage Grade to General Schedule. Plaintiff declined because the change would result in no pay increase.

In June 1971, plaintiff was again approached by the Director and advised that a change to the General Schedule at that time would result in a one penny per hour increase in pay, but also the change would be termed a "promotion" and offered possibly better career opportunities. Plaintiff accepted the promotion and change to General Schedule. In November of that year (1971), the Wage Grade personnel received a 5.5% increase, whereas the General Schedule had received an increase in January, 1971, and the effect of these increases was that plaintiff, at the end of the year, was making less money than he would have

made had he remained in the Wage Grade. The reason behind this discrepancy is that the Wage Grade increases occur at a different time of the year and are set according to prevailing wage scales in the area, whereas the General Schedule is set by Congress. At the time of plaintiff's change from Wage Grade to General Schedule, he knew of the different dates of salary increases and the manner in which they were set.

There is no evidence that any actions on the part of plaintiff's supervisors were racially motivated, but rather were performed with the best interests of the plaintiff in mind.

Plaintiff's contentions as to racial discrimination in 1972, when he was promoted to G.S.6 instead of 7, are without merit. The testimony of Ms. Dimla of the Personnel Department indicates that the increases in step grades are uniform to all employees, and that the proper grade increment is one step, not two, in this situation. There is no evidence of racial discrimination with reference to the 1972 promotion - the promotion step was proper and accurate, as the classification personnel so testified.

Plaintiff's contentions with reference to the 1979 reorganization, wherein he alleges that because he had additional duties imposed he should have been given a promotion, are without merit. The evidence presented indicates that the purpose of the reorganization was to make the laboratory more flexible. The duties that plaintiff was carrying out as a result of the reorganization were G.S.6 duties, and he, the plaintiff, was

properly classified as a C.S.6. White employees were also given additional duties with no grade increases.

The plaintiff further alleges that his being asked to give up the keys of the laboratory had a racial basis. The evidence presented indicates that there had been six robberies at the laboratory when laboratory equipment had been stolen, and in an effort to effect better security, it was decided that only those persons on emergency call should have keys to the laboratory. There were only three people on the emergency list to receive these keys - the Chief of the Section, Chief of Maintenance, and one Director. The evidence further indicated that when he plaintiff was required to work on weekends, he was given keys to the labaoratory. The court finds no evidence of racial discrimination in requiring the plaintiff, along with other employees, to turn in their keys.

The plaintiff has presented no evidence of any pattern of practice in the laboratory that had more impact on blacks than on whites. There is no evidence to sustain his allegation.

Plaintiff has heretofore presented his allegations of racial discrimination to the U.S. Army Civilian Appellate Review-Agency, and to the E.E.O.C., and each had found no discrimination on the basis of race or color.

The court finds that plaintiff has not sustained his burden of proof. Plaintiff has not established racial discrimination or disparate treatement. Each and every one of defendant's actions toward plaintiff were performed for legitimate non-discriminatory

business reasons.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action under 42 U.S.C. Section 2000e et seq.

2. Plaintiff has failed to establish a prima facie or any case of racial discrimination.

3. Plaitiff has failed to show that defendant's stated explanation and evidence for its actions were a mere pretext.

4. Judgment is rendered for the defendant and against plaintff.

Dated February 1, 1988

/s/ SAMUEL CONTI

UNITED STATES DISTRICT JUDGE

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Filed February 9, 1990
No. 88 - 1781

D.C. No. CV 83-2200 SC

ALVIN DOUGLAS,

Plaintiff-Appellant

vs

JOHN MARSH, Secretary of the United States Department of the Army,

Defendant-Appellee

MEMORANDUM

Appeal from the United States
District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Submitted February 7, 1990

Before: CANBY, BRUNETTI and FERNANDEZ, Circuit Judges

Alvin Douglas appeals the district court's judgment in favor of the United States Army in Douglas' employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Douglas contends that the

district court erred by finding that he had failed to establish a prima facie case of racial discrimination and by failing to transfer his claims of breach of contract, fraud, and misrepresentation to the United States Claims Court. We have jurisdiction under 28 U.S.C. Section 1291 and we affirm.

We review de novo a district court's finding that plaintiff failed to establish a prima facie case of discriminatory impact. Clady v Los Angeles County, 770 F.2d 1421, 1427 (9th Cir. 1985), cert. denied, 475 U.S. 1109 (1986).

Title VII was not amended to include federal employees until March 24, 1972. 42 U.S.C. Section 2000e-16; Revis v Laird, 627 F.2d 982,983 (9th Cir. 1980). consequently, events which took place prior to March 24, 1972 are not actionable except as part of a pattern of discrimination continuing after that date. See Williams v Owens Illinois, 665 F.2d 918, 924 (9th Cir.), cert. denied, 459 U.S. 971 (1982). To establish a prima facie case of disparate impact, a plaintiff must show that "a business practice, neutral on its face, had a substantial, adverse impact on some group protected by Title VII." Robinson v Adams, 847 F.2d 1315, 1317-18 (9th Cir. 1988), cert. denied, 109 S.Ct. 3155 (1989). Plaintiff must generally show both that the protected group is not hired or promoted in proportion to its percentage in the pool of qualified employees and a causal link between the hiring or promotion practice and the under-representation. See Wards Cove Packing Co., Inc. v Atonio, 109 S.Ct.

2115, 2123-24 (1989); Robinson, 847 F.2d at 1318.

Douglas' amended complaint alleged that his 1971 transfer from the wage grade pay scale to the general schedule pay scale resulted in a loss of compensation and was racially motivated. The transfer occurred before the amendment of Title VII and so is not actionable except as part of a continuing discriminatory pattern and practice of promotion. See Williams, 665 F.2d at 924.

Douglas also alleged that the Army's pattern and practice of promotion had a disparate impact on black employees. Nonetheless, he did not introduce any statistical evidence to show that black employees were promoted differently than other employees, or even that any black employees had applied for the positions from which they were allegedly precluded. He also failed to show any causal link between the Army's promotion practices and that fact that no blacks held upper management positions at the lab in which Douglas was employed.

Therefore, the district court did not err by finding that douglas failed to establish a prima facie case of disparate impact. See Robinson, 847 F.2d at 1318.

Douglas did not appeal the dismissal of his breach of contract and tort claims, but contends that the district court should have transferred those claims to the United States Claims Court sua sponte. He failed to raise this claim in the district court and does not allege any exceptional circumstance explaining

his failure to do so. He has not shown that manifest injustice will ensue if this court declines to consider the transfer issue. Consequently, he may not raise it for the first time on appeal. See Huettig & Schramm, Inc. v. Landscape Contractors Council, 790 F2d 1421, 1426 (9th Circuit 1986); United States v. Oregon 769 F2d 1410, 1414 (9th Circuit 1985).

AFFIRMED

APPENDIX C

42 USC § 2000E-2 Unlawful employment practices

Employer Practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

5 U.S.C. Section 5362

(a) Any employee -

...

2. who has served for 52 consecutive weeks or more in one or more positions subject to this subchapter at a grade or grades higher than that of the new position, is entitled, to the extent provided in subsection (c) of this section, to have the grade of his position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2 year period beginning on the date of such placement.

(b) 1. any employee who is in a position subject to this subchapter and whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section, to have the grade of such position before reduction be treated as the retained grade of such employee for the 2 year period beginning on the date of reduction in grade.

2. The provisions of paragraph 1 of this subsection shall not apply with respect to any reduction in the grade of a position which has not been classified at the higher grade for a continuous period of at least one year immediately before such reduction.

(c) For the 2 year period referred to in subsections (a) and (b) of this section, the retained grade of an employee under such subsection (a) or (b) shall be treated as the grade of the

employee's position for all purposes (including pay and pay administration under this chapter and chapters 54 and 55 of this title, retirement and life insurance under chapters 83 and 87 of this title, and eligibility for training and promotion under this title) except:

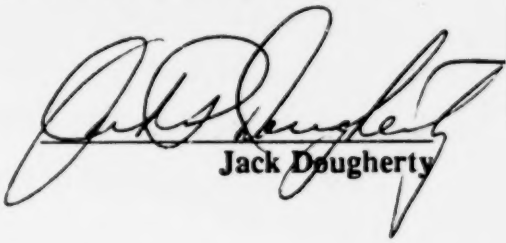
1. for purposes of subsection (a) of this section;
2. for purposes of applying any RIF (reduction in force) procedures;
3. for purposes of determining whether the employee is covered by the merit pay system established under Section 5402 of this title, or
4. for such other purposes as the OPM may provide by regulation.

(d) The foregoing provisions of this section shall cease to apply to an employee who:

1. has a break in service of one work day or more;
2. is demoted (determined without regard to this section for personal cause or at the employee's request;
3. is placed in, or declines a reasonable offer of, a position the grade of which is equal to or higher that the retained grade; or
4. elects in writing to have the benefits of this section terminate.

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing instrument were mailed this 4th day of May, 1990, by the United States mail to Stephen A Shefler, Esq., U.S. Attorney's Office, 450 Golden Gate Avenue, 16th Floor, San Francisco, CA 94102



Jack Dougherty